Supreme Court, U.S.
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No.

In the
**Supreme Court of the United States**

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JESSIE A. QUINTANILLA, SERGEANT,
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Should this Court hold Petitioner's case until it decides *Carey v. Musladin,* 126 S. Ct. 1769 (Apr. 17, 2006) (order granting writ of certiorari) and then grant, vacate, and remand where the victims' family members' presence and behavior during trial, including an emotional outburst during the pathologist's testimony, may have introduced impermissible factors that prejudiced Petitioner's constitutional right to a fair trial as discussed in *Holbrook v. Flynn*, 475 U.S. 560 (1986)?

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In The

**SUPREME COURT OF THE UNITED STATES**

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JESSIE A. QUINTANILLA, PETITIONER

v.

UNITED STATES OF AMERICA

---

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

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## PETITION FOR A WRIT OF CERTIORARI

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Sergeant Jessie A. Quintanilla, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

## OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Armed Forces denying Petitioner's Petition for Reconsideration (Appendix A at 1a) is unpublished. The opinion of the United States Court of Appeals for the Armed Forces (App. B at 2a) is reported at 63 M.J. 29 (C.A.A.F. 2006). The opinion of the United States Navy-Marine Corps Court of Criminal Appeals (App. C at 28a) is reported at 60 M.J. 852 (N-M. Ct. Crim. App. 2005).

## JURISDICTION

The judgment of the court of appeals was entered on March 28, 2006, and rehearing denied on May 4, 2006. The Court's jurisdiction rests on 28 U.S.C. § 1259(3).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

## STATEMENT

Sergeant Quintanilla was charged, among other offenses, with the premeditated murder of Lieutenant Colonel (LtCol) Kidd, his executive officer, and the attempted murder of LtCol Heffner, his commanding officer.[1] During the court-martial, the government moved to allow LtCol Kidd's widow and brother and LtCol Heffner's wife to watch the trial as spectators, despite the fact that they would be witnesses during the sentencing. Additionally, LtCol Kidd's sister, Dr. Lisa

[1] Sergeant Quintanilla's charges included specifications of attempted murder, an orders violation for carrying a concealed weapon, premeditated murder, communicating a threat, and obstruction of justice in violation of Articles 80, 92, 118, 128 and 134, UCMJ, 10 U.S.C. §§ 880, 892, 918, 928 and 934 (1994).

Kidd, offered sentencing testimony that made reference to the testimony of a previous witness, indicating she was also not sequestered. The military judge granted the government motion and allowed the families of the victims to watch the trial. Both the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces found this to be an error, based on the then-existing law.[2]

During her response to the trial counsel's final question during the sentencing portion of the court-martial, Mrs. Kidd specifically referred to the testimony of First Lieutenant Colombo, USMC, from the previous day's sentencing hearing. She testified, "It meant a lot to me to hear yesterday when Lieutenant Colombo told us all that he stood there by his XO and stayed with him because no one should have [to] die all by themselves without anybody there."

Additionally, LtCol Heffner's wife was "very emotional throughout the trial" according to one of the court-reporters. And she made facial expressions during witness' testimony that were noticeable at least at the court reporter's desk.

Less than four months after Sergeant Quintanilla's court-martial adjourned, the senior member of the trial counsel (prosecution) team delivered a series of lectures

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[2] *United States v. Quintanilla*, 63 M.J. 29, 38 (C.A.A.F. 2006) (assuming an error, but not reaching its prejudice because of the resolution of other issues); *United States v. Quintanilla*, 60 M.J. 852, 867 (N-M. Ct. Crim. App. 2005) (finding an error but no prejudice).

concerning the case.[3] During these lectures, Maj Glazier discussed the impact of the family members' presence in the courtroom. He described deliberately exploiting Mrs. Kidd's attendance at trial to affect the members. Maj Glazier explained:

> [T]he wife of Lieutenant Colonel Kidd wanted to be there for the 32.[4] There were many reasons why I wanted her nowhere near the Article 32. . . . The number one biggest tactical reason for that is I didn't want her to see the accused. I wanted that shock effect at trial, when she sat in the gallery at trial, and the members walked in she still, in a pallor, because she's just seen the face, that I showed you yesterday, of the guy who just murdered her husband. You need that. You want that.

Maj Glazier also described what occurred while Mrs. Kidd was sitting in the back of the courtroom during the pathologist's testimony. Mrs. Kidd was "composed throughout the pathologist's testimony" until the pathologist testified that it might have taken LtCol Kidd five minutes to die. Then Mrs. Kidd "got up and in a very

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[3] Maj Guy Glazier, Government Capital Litigation Course Transcripts I-IV (28-29 March 1997) (attached to the Record May 3, 2001).

[4] An Article 32 hearing is a pretrial investigation roughly akin to a grand jury hearing. *See* Article 32, UCMJ, 10 U.S.C. § 832.

composed fashion she walked out of the courtroom and walked down the hall and there wasn't a single member, party or anyone else sitting in that courtroom that wasn't chilled to the bone by the blood curdling scream that came down the hallway."[5]

Maj Glazier also repeated members' comments concerning the powerful effect created by the presence of the victims' family members. He indicated that "[t]he jury liked the fact that the victims sat through the courtroom." "[A] couple of the members of the jury came up to me later and said, 'Boy, you know, having Mrs. Kidd there was very, sitting in the back of the courtroom, was very powerful for us.'"

Sergeant Quintanilla was convicted of all the charges and was sentenced to death, total forfeitures, and reduction to the lowest enlisted pay grade.

The Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence because the military judge improperly granted a challenge for cause against a court-martial member.[6]

The Judge Advocate General of the Navy certified the case to the court of appeals under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) and Sergeant Quintanilla petitioned for a grant of review under Article 67(a)(3),

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[5] While no scream is audible on the court reporter's tape recording of pathologist's testimony, the court reporter indicated that her equipment would not have been capable of picking up noises from outside the courtroom, even if they were audible in the courtroom. (Declaration of SSgt Tonja Pilgrim, USMC (Ret.).)

[6] *United States v. Quintanilla*, 60 M.J. at 868.

UCMJ, 10 U.S.C. § 867(a)(3). The court of appeals reversed the Navy-Marine Corps Court of Criminal Appeals' decision setting aside the findings, reinstated the findings and set aside the sentence, ordering a new sentencing hearing.[7]

## REASONS FOR GRANTING THE PETITION

Sergeant Quintanilla's case is extremely similar to *Carey v. Musladin*, 126 S. Ct. 1769 (Apr. 17, 2006), where this Court recently granted a writ for certiorari. As in *Carey*, impermissible outside influences prejudiced Petitioner's constitutional right to a fair trial. This Court should hold Petitioner's case until it decides *Carey v. Musladin*, and then grant, vacate, and remand for further proceedings.

The military judge's error in failing to sequester the victims' family members resulted in unacceptable risk of impermissible factors coming into play. This risk was heightened by the deliberate actions of the trial counsel in exploiting Mrs. Kidd's attendance.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences."[8] Although service members lack the Sixth Amendment right to a trial by jury,[9] they are entitled to fair trial.[10] Furthermore, "trial courts must take strong measures to

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[7] *United States v. Quintanilla*, 63 M.J. at 39.

[8] *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

[9] *Ex parte Quirin*, 317 U.S. 1, 40 (1942).

[10] *United States v. Gravitt*, 17 C.M.R. 249, 256 (C.M.A. 1954).

ensure that the balance is never weighed against the accused." [11] By refusing to sequester the family members, the military judge created the sort of situation where "the unacceptable risk of impermissible factors" were introduced that inherently prejudiced the defendant's constitutional right to a fair trial. [12] In *Holbrook v. Flynn*, this Court held that the mere existence of such a risk is what defines inherent prejudice, rather than whether or not the "jurors actually articulated a consciousness of some prejudicial effect." [13] This Court provided guidance into what would constitute impermissible factors when it decried the use of "official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial in order to establish guilty or innocence." [14]

This Court maintained in *Turner v. Louisiana* that "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand . . ." [15] Here, the government was able to introduce extreme pathos into Petitioner's court-martial from outside the witness stand.

In a fair trial, guilt and innocence is determined on the basis of the evidence introduced at trial. [16] Here there was an unacceptable risk of impermissible factors

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[11] *Id.*

[12] *See Holbrook v. Flynn*, 475 U.S. 560, 570 (1986).

[13] *Id.*

[14] *Id.* at 567.

[15] *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

[16] *Id.*

coming into play, as well as, a distinct prejudicial effect upon the members resulting from Mrs. Kidd's emotional presence in the courtroom. The presence and reaction of the victims' family members were "circumstances not adduced as proof at trial."[17] Because this case involves such similar issues to *Carey v. Musladin*, it warrants review by this Court.

## CONCLUSION

This petition for a writ of certiorari should be granted, the case vacated and remanded for further proceedings after this Court decides *Carey v. Musladin*.

Respectfully submitted,

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[17] *Id.*

## Appendix A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,

v.

Jessie A. QUINTANILLA, Appellant.

Nos. 05-0274/MC & 05-5001/MC.

Decided May 4, 2006

On consideration of Appellant/Cross-Appellee's petition for reconsideration and motion for oral argument on the petition for reconsideration, said motion is denied, and the petition for reconsideration is denied.

**Appendix B**

UNITED STATES v. Jessie A. QUINTANILLA,
Sergeant U.S. Marine Corps

Nos. 05-0274 and 05-5001

UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

63 M.J. 29; 2006 CAAF LEXIS 360

December 6, 2005, Argued
March 28, 2006, Decided

For Appellant: Lieutenant Commander Jason S. Grover, JAGC, USN (argued); Lieutenant Colonel Joseph R. Perlak, USMC, Lieutenant Elysia G. Ng, JAGC, USN, and Lieutenant Stephen C. Reyes, JAGC, USNR (on brief); Captain Pamela A. Holden, JAGC, USN.

For Appellee: Major Wilbur Lee, USMC (argued); Commander Charles N. Purnell II, JAGC, USN, and Captain Glen R. Hines, USMC (on brief); Colonel William K. Lietzau, USMC.

Judges: EFFRON, J., GIERKE, C.J., and CRAWFORD, BAKER, and ERDMANN, JJ., joined.

PER CURIAM:

Judge EFFRON delivered the opinion of the Court.

At a general court-martial composed of officer and enlisted members, Appellant/Cross-Appellee (Appellant) was convicted, contrary to his pleas, of premeditated murder, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918 (2000). In addition, the court-martial convicted Appellant, contrary to his pleas, of attempted unpremeditated murder (two specifications), violation of an order, aggravated assault (two specifications), unlawfully carrying a concealed weapon, communicating a threat, and obstruction of justice, in violation of Articles 80, 92, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 928, 934 (2000). Appellant was sentenced to death, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence. On appeal, the United States Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence and authorized a rehearing. United States v. Quintanilla, 60 M.J. 852, 863, 868 (N-M. Ct. Crim. App. 2005).

The Judge Advocate General of the Navy certified the following issues under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2000):

I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRONEOUSLY APPLIED A HEIGHTENED STANDARD OF REVIEW IN DETERMINING THAT THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S CHALLENGE FOR CAUSE

AGAINST MASTER SERGEANT BUCKHAM, A VENIREMAN IN THE CASE.

II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS IMPROPERLY CONSIDERED A POST-TRIAL AFFIDAVIT FROM MASTER SERGEANT BUCKHAM, A VENIREMAN IN THIS CASE, IN DETERMINING THAT THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S CHALLENGE FOR CAUSE.

III. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN IT SET ASIDE BOTH THE FINDINGS AND SENTENCE, RATHER THAN THE SENTENCE ALONE, AS A REMEDY FOR THE MILITARY JUDGE'S EXCUSAL OF A VENIREMAN.

On Appellant's petition, we granted review of the following issues:

I. THE LOWER COURT FOUND ERROR IN THE MILITARY JUDGE'S FAILURE TO SEQUESTER THREE GOVERNMENT WITNESSES BUT HELD THAT THE ERROR DID NOT PREJUDICE THE APPELLANT. DID THE LOWER COURT PROPERLY APPLY THE TEST FOR PREJUDICE UNDER UNITED STATES v. LANGSTON, 53 M.J. 335 (C.A.A.F. 2000) AND UNITED STATES v. SPANN, 51 M.J. 89 (C.A.A.F. 1999)?

II. THE LOWER COURT FOUND THAT THE MILITARY JUDGE USED AN INCORRECT LEGAL

TEST IN GRANTING A GOVERNMENT CHALLENGE FOR CAUSE BECAUSE A MEMBER MIGHT HAVE "DIFFICULTY" IN VOTING FOR A DEATH SENTENCE. DID THE LOWER COURT ERR IN NONETHELESS CONCLUDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN GRANTING THE CHALLENGE FOR CAUSE?

III. THE LOWER COURT FOUND MULTIPLE OCCASIONS OF PROSECUTORIAL MISCONDUCT IN THE COURT-MARTIAL. DID THE LOWER COURT ERR IN DETERMINING THAT THE APPELLANT WAS NOT PREJUDICED BY THE PROSECUTORIAL MISCONDUCT?

For the reasons set forth below, we conclude that the military judge erred in granting a prosecution challenge to a panel member. We also conclude that the lower court erred in setting aside the findings as a remedy for the military judge's error. We affirm that portion of the lower court's decision ordering further proceedings on the sentence.

I. BACKGROUND

Appellant entered the office of his squadron executive officer (XO), Lieutenant Colonel (LtCol) Daniel Kidd, at Camp Pendleton, California, and shot him. LtCol Kidd staggered into an adjacent room where the squadron commanding officer (CO), LtCol Thomas Heffner, was preparing for an inspection. Appellant entered the room, shot LtCol Heffner in the chest, and

shot LtCol Kidd again. LtCol Heffner was able to escape. LtCol Kidd died shortly thereafter.

As Appellant pursued LtCol Heffner, he pointed his pistol at two Marines but did not discharge the weapon. Appellant shot at and missed a third Marine, who disarmed Appellant. Appellant fled, encountered a number of Marines who were unaware of the shootings, and said: "Gunnery Sergeant, apprehend me, I just shot the CO and XO." See Quintanilla, 60 M.J. at 854-55.

## II. THE GOVERNMENT'S CHALLENGES FOR CAUSE (CERTIFIED ISSUES I, II, AND III, AND GRANTED ISSUE II)

### A. BACKGROUND

At the ensuing court-martial, the military judge granted the prosecution's challenge for cause against two members of the panel, LtCol D'Ambra and Master Sergeant (MSgt) Buckham III. The Court of Criminal Appeals ruled that the military judge erred in granting the challenge as to MSgt Buckham but did not err in granting the challenge as to LtCol D'Ambra. Id. at 860-61. In Certified Issues I-III, the Government seeks to reverse the court below with respect to MSgt Buckham, thereby sustaining the ruling by the military judge. In Granted Issue II, Appellant seeks to reverse the court below with respect to LtCol D'Ambra, thereby overturning the military judge.

During voir dire, the military judge permitted counsel to examine the panel members for the purpose of identifying possible grounds for challenge. See Rule for

Courts-Martial (R.C.M.) 912(d). We shall consider below the statements by LtCol D'Ambra and MSgt Buckham, the views of the parties at trial, and the rulings of the military judge.

1. Voir Dire of MSgt Buckham

In response to questions from trial counsel about his religious beliefs, MSgt Buckham stated that he was a deacon in a Baptist church that was part of the Baptist General Conference. Trial counsel inquired as to the views of the Baptist General Conference on the death penalty:

> Q: Now, do you know what the church's stand or what their plank is on the death penalty?
>
> A: Our -- to the best of my knowledge, our church has no official position.

Trial counsel also asked whether the death penalty had been the topic of conversation at the church:

> Q: Have you ever discussed that in church or discussed that in some Bible studies, stuff like that, conversations like that, the death penalty?
>
> A: Not that I recall, sir.

After receiving these negative replies, trial counsel sought to explore MSgt Buckham's views on the Bible:

Q: Okay. Describe for me generally the death penalty in the biblical context.

A: Well, sir, I certainly haven't formed a conviction of what the Bible says about the death penalty.

Following an extended discussion of a biblical passage, trial counsel asked:

Q: Do you think from that parable of the Bible and that story that Christ has forbidden you, if you believe in Christianity from voting for the death penalty?

A: I don't believe that is particularly something that would go into building a conviction about the death penalty.

Q: Is there –

A: Not -- I do not -- I don't believe that that prohibits me from thinking that the death penalty is a valid action.

Q: Okay. I got the impression there was something else that you were going [to] say. Is there maybe something else there that would prohibit you from considering that?

A: No, sir.

Q: Nothing else in the New Testament? Anything else in the Bible that you think makes you kind of

sit back and say, you know, I'm not sure we should be doing this?

A: No, sir. I believe the death penalty is a not often used means of -- of -- of a penalty, that if -- if warranted, is just. And I also think it is a -- is a factor in society that would prohibit others from doing like crimes.

Trial counsel then sought to explore whether MSgt Buckham might pray before making a major decision, such as whether to impose the death penalty:

Q: Let me ask you this: As a Christian, do you pray about important decisions?

A: Yes, sir.

Q: Significant decisions, you seek direction from God?

A: Yes, sir.

ADC: Sir, objection. At this point, I think we're getting way too personal with the [Master Sergeant]. These are personal convictions that don't need to be aired in this courtroom.

MJ: Sustained. Let's move on.

ATC: Generally, sir -- I'll back off from that. But the one question I wanted to get to, sir, was whether in this case the Master Sergeant felt that when he voted for death or not to vote for death,

whether he would consider that a decision he would need to pray about.

MJ: All right. You can ask that question.

Q: Does that question kind of make sense to you, Master Sergeant?

A: Sir, would you ask the question again, please.

Q: When you go back in that deliberation room and you're all talking about -- if we ever get to that point, okay, and you are deciding whether to vote for the death penalty for Sergeant Quintanilla or vote against the death penalty, is that a decision that you feel that is one of those important decisions that we just talked about that you would actually pray about and seek direction from God about?

A: Sir, my -- my aim is to live my life in prayer through the meditation of God's word and the application of that word on a daily, even hourly basis. So in answer to that question, yes, I would make it a matter of prayer.

Q: I'm certainly not trying to give you the impression that you shouldn't do that at all.

A: Understood, sir.

Defense counsel then asked MSgt Buckham to elaborate on the responses he had given to trial counsel's questions about religion:

ADC: [Master Sergeant], I take it from your discussion [with trial counsel] that you possess a great personal faith and that faith is a very high priority in your life; correct?

A: That's correct, sir.

Q: And when asked about would you weigh this -- would you have to pray about this decision, I take it from the way you live your life you pray about all weighty decisions and that's a part of who you are. Fair enough?

A: Yes, sir. . . .

Q: And if [the military judge] tells you how this case shapes up, if the death penalty is a valid and authorized penalty, then you have to be able to consider that and be able to possibly do that. Are you able to do that, [Master Sergeant]?

A: To consider what the judge –

Q: Right. Exactly. If [the military judge] tells you that the death penalty may be authorized in this case, and this [is] an authorized punishment, you have to be able to consider using the death penalty or ordering the death penalty. Can you do that?

A: Yes, I can, sir.

2. Voir Dire of LtCol D'Ambra

Trial counsel asked LtCol D'Ambra about his willingness to consider the death penalty: "If the government meets all of its burdens in this case . . . can you seriously consider the death penalty in this case?" LtCol D'Ambra responded: "I can consider it." Trial counsel noted that on his pretrial questionnaire, LtCol D'Ambra stated that he had "mixed" feelings about the death penalty, and asked: "Do you have any leanings one way or another that you feel will give you trouble considering the death penalty?" In response, LtCol D'Ambra said that he was not sure what trial counsel was "driving at." He added:

Basically it would be religious -- for religious reasons, whether I am -- I just can't make that decision at this time over something I was afraid of whether I could actually vote for a death penalty. I mean, I certainly feel that it is justified but it's the other side that contradicts whether it is ever warranted.

The dialogue then turned to LtCol D'Ambra's religion:

> Q: Sir, I notice from your questionnaire you are -- you're a practicing Catholic.
>
> A: Yes.
>
> Q: Is there anything about that, your religion, that will prevent you from seriously considering the death penalty should the government, again, meet all of its burdens in this case?

A: Well, as far as I know the Catholic church does -- is against the death penalty. But, again, it all goes to a conscious decisions [sic] I'll have to make and it's just something that I'll have to wait and consider.

Trial counsel asked specifically about the relationship between LtCol D'Ambra's religious affiliation and the application of the death penalty in the present case:

Q: Will you have difficulty considering the death penalty, should the government meet all of its burdens, because of your religion?

A: I don't know if I'll have difficulty but it's going to be something that I'll have to wrestle with, yes.

In response to questions by defense counsel, LtCol D'Ambra confirmed that he would not rule out the death penalty. LtCol D'Ambra responded affirmatively when defense counsel asked whether he would be able to weigh and consider the death penalty "if the military judge instructs you that the death penalty may be a valid option of punishment in this case."

3. The Government's challenges to LtCol D'Ambra and MSgt Buckham

Following voir dire, trial counsel challenged several members of the panel for cause, including LtCol D'Ambra and MSgt Buckham. With respect to LtCol D'Ambra, trial counsel argued:

> Our basis would be in his discussion about his religious faith and that he would need to pray about his decision in regard to the death penalty. It's an obvious notation that he's a practicing Catholic and the Catholic churches oppose to [sic] the death penalty.
>
> We believe that would certainly leave the impression that he could not consider that -- the fact -- I think it works both ways in this case. The fact if he's praying about this decision or feels his religious decision is that, in fact, he should give the death penalty or shouldn't give it, that's not going to be based on the evidence presented in this case but on a more personal side of the house in his prayer life, I guess is better words.

Defense counsel responded by highlighting the statement by LtCol D'Ambra that he could consider the death penalty. Defense counsel also took the position that a panel member should not be excused for praying over a major decision: "Simply by the fact that he may need to pray over a big decision shouldn't excuse him, sir. We take that into court when we make our decisions. Members take their real life experiences and use that to make their decisions."

Trial counsel next challenged MSgt Buckham, stating: "Again, same similar issues on that one, sir. Again, he discusses about seeking guidance from God, praying about that decision." Noting that MSgt Buckham reacted emotionally when faced with questions regarding his religious beliefs, trial counsel said: "If he's having a

difficult time at this point certainly when we're at that stage of the trial he's going to be faced with that same or similar difficulty."

In response, defense counsel said:

> We object to that, sir. It's not a basis for a challenge for cause. He states he feels the death penalty is a deterrent. He's not prohibited from imposing the death penalty by any religious beliefs. There's nothing in his biblical studies that would restrict him from imposing the death penalty. He could consider it. Simply because he's emotional and he may pray about something, the same arguments before with the Lieutenant Colonel, sir. You shouldn't excuse him. It's not a basis for any challenge for cause.

The military judge then asked defense counsel about MSgt Buckham's visual emotional reaction during voir dire. Defense counsel responded:

> Sir, there's no substantial doubt as to if he's sitting on the court as a member as to legality, fairness and impartiality, and that's what R.C.M. 912 says as a basis for a challenge. He simply was somewhat emotional realizing it's going to be an important decision but in no way -- no which prohibit him and it's not a basis for a challenge, sir.

4. The military judge's ruling on the Government's challenges for cause

The military judge granted the challenges for cause against LtCol D'Ambra and MSgt Buckham. The military judge focused his ruling on the religious beliefs of the two challenged members:

> Based on the guidelines of R.C.M. 912(f)(1)(N), it is my mandate as military judge to ensure that this court-martial be free from substantial doubt as to fairness and impartiality of the members. Applying this guidance based on the responses by Lieutenant Colonel D'Ambra and Master Sergeant Buckman . . ., the court opines that based on their strongly held religious beliefs they will have difficulty in considering the entire range of punishments in this case.

B. DISCUSSION

1. Standard of review

We review a military judge's decision on a challenge for cause for a "clear abuse of discretion." United States v. James, 61 M.J. 132, 138 (C.A.A.F. 2005). An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

A "military judge's ruling on a challenge for cause is given great deference." United States v. Rolle, 53 M.J. 187, 191 (C.A.A.F. 2000) (internal quotation marks omitted). In the course of reviewing the military judge's ruling on a challenge for cause, it is "appropriate to

recognize the military judge's superior position to evaluate the demeanor of court members." James, 61 M.J. at 138.

Although we take into account the views of the Court of Criminal Appeals on challenges for cause, we typically employ a direct review of the ruling of the military judge. See United States v. Siroky, 44 M.J. 394, 399 (C.A.A.F. 1996); James, 61 M.J. at 139. In that context, it is appropriate at this point to address Certified Issues I and II, which involve two aspects of the opinion issued by the Court of Criminal Appeals.

Certified Issue I asks whether the court below erred in declining to apply the standard set forth in Rolle, 53 M.J. at 191. See Quintanilla, 60 M.J. at 859. We answer that question in the affirmative. Rolle addresses the degree of deference that should be applied by an appellate court after scrutinizing the record. Id. t 192-93. The careful scrutiny that accompanies capital cases is not incompatible with applying the Rolle standard of review after that scrutiny has been completed. In any case, because we are reviewing the decision of the military judge, any error by the court below in employing a standard of review does not affect our review.

Certified Issue II asks whether it was appropriate for the court below to rely on a post-trial affidavit of MSgt Buckham to assess the validity of the ruling by the military judge on the challenge to that member. See Quintanilla, 60 M.J. at 861-62. The court below did not identify any reason to depart from the normal practice of relying on the factual information developed in the

record of trial when addressing challenges for cause. See United States v. Vangelisti, 30 M.J. 234, 237 (C.M.A. 1990). Accordingly, we answer the second certified question in the affirmative. As we noted with respect to Certified Issue I, any error by the court below in this regard is immaterial to our direct review of the decision at trial by the military judge.

2. Standard applicable to rulings on challenges for cause

R.C.M. 912(f)(1)(N) sets forth the applicable provision of law. Under the rule, a panel member shall be excused for cause when the member should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Id. Under this provision, a member who has "an inelastic opinion concerning an appropriate sentence for the offenses charged" may be challenged. R.C.M. 912(f)(1)(N) Discussion; James, 61 M.J. at 138.

When the issue of an inelastic opinion arises in a capital case with respect to the imposition of the death penalty, the Supreme Court's decision in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), supplies the applicable legal standard. In Wainwright, the Supreme Court articulated the following standard for determining whether a prospective juror could be excluded for cause because of his or her views on capital punishment: "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 424 (internal quotation marks omitted); see also United States v. Gray, 51 M.J. 1, 31-32 (C.A.A.F. 1999).

3. Review of the military judge's ruling on MSgt Buckham

The military judge cited MSgt Buckham's religious beliefs in granting the Government's challenge. The military judge did not apply the standard in Wainwright or otherwise identify any aspects of MSgt Buckham's beliefs that would satisfy the Wainwright standard.

The Government suggests that we should treat the military judge's ruling as incorporating trial counsel's argument that MSgt Buckham warranted excusal because of his emotional demeanor. The military judge's ruling, however, did not cite or rely upon trial counsel's argument, which was rebutted by the defense, and did not address the disagreement between the parties.

Instead, the military judge focused erroneously on the "religious beliefs" of MSgt Buckham. MSgt Buckham repeatedly emphasized that no restrictions on voting for the death penalty flowed from his religious affiliation. MSgt Buckham simply noted that, as a religious person, he would pray in the course of making an important decision. That statement contains no suggestion that his "religious beliefs" would preclude him from following and applying the instructions of the military judge in accordance with his oath as a panel member. See James, 61 M.J. at 138. Accordingly, the military judge erred in granting the Government's causal challenge against MSgt Buckham. In view of our conclusion, we need not decide the related issue concerning the military judge's decision granting the prosecution's challenge for cause against LtCol D'Ambra.

4. Remedy

The lower court set aside the findings as well as the sentence. Quintanilla, 60 M.J. at 863, 868. Certified Issue III asks whether the court below erred in setting aside the findings. The Government contends that the appropriate remedy would be to affirm the findings, set aside the sentence, and authorize a rehearing on the sentence. We review the question of whether the remedy developed by the lower court was appropriate for an abuse of discretion. See United States v. Manuel, 43 M.J. 282, 288 (C.A.A.F. 1995).

The military judge granted the challenges at issue because of his concerns regarding the members' ability to impose a certain sentence, the death penalty. In Witherspoon v. Illinois, 391 U.S. 510, 516-18, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the Supreme Court addressed whether the findings as well as the sentence should be set aside when jurors were improperly excused due to their views on the death penalty. The Supreme Court held that only the sentence should be reversed, stating: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." Id. at 517-18. Although the Supreme Court has subsequently modified other aspects of Witherspoon, see Wainwright, 469 U.S. at 418-26, the Court has not altered its view as to the appropriate remedy for improper exclusion. See, e.g., Gray v. Mississippi, 481 U.S. 648, 668, 107 S. Ct. 2045, 95 L.

Ed. 2d 622 (1987); Adams v. Texas, 448 U.S. 38, 51, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

Supreme Court precedents developed in cases arising outside the military justice system are applied as precedents in the military justice system unless distinguishable based upon unique military justice considerations. See, e.g., United States v. Matthews, 16 M.J. 354, 369 (C.M.A. 1983); Article 36, UCMJ, 10 U.S.C. § 836 (2000). The defense suggests that Witherspoon is not applicable in the military justice system, relying on our decision in United States v. Giles, 48 M.J. 60 (C.A.A.F. 1998). In Giles, we set aside the findings and sentence after concluding that the military judge abused his discretion by denying a defense challenge for cause against a member. Id. at 63. Giles, however, addresses consequences that are not at issue in the present case, related primarily to the fact that the parties in the military justice system are limited to a single peremptory challenge. See id. at 62; Article 41(b), UCMJ, 10 U.S.C. § 841(b) (2000).

If a defense challenge to a panel member is denied, as in Giles, the defense must decide whether to allow the disqualified member to sit on the panel or to use its single peremptory challenge against that member. Under such circumstances, the erroneous denial of a defense causal challenge creates a significant burden on the statutory right of the defense to exercise a peremptory challenge to remove a member objectionable to the defense. In that context, we concluded in Giles that the appropriate remedy required reversal of the findings and the sentence. Id. at 63.

Here, however, the military judge's erroneous ruling had no impact on the defense's right to exercise a peremptory challenge. Additionally, there has been no allegation that any of the members who sat on the panel held a bias against Appellant or otherwise should have been disqualified. See id.

A departure from Witherspoon is not warranted by our precedent or by the unique aspects of the military justice system. Accordingly, we reverse the lower court's decision to the extent that it set aside the findings as a remedy for the military judge's erroneous grant for the prosecution's challenge for cause.

III. FAILURE TO SEQUESTER WITNESSES (GRANTED ISSUE I)

In a pretrial session pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2000), trial counsel moved to allow the widow and brother of LtCol Kidd and the wife of LtCol Heffner to remain in the courtroom as spectators. Trial counsel acknowledged that all three were likely to be called as Government witnesses during sentencing but argued that a federal statute allowed their presence at trial. Despite defense counsel's objection under Military Rule of Evidence (M.R.E.) 615, which provides for the exclusion of witnesses at the request of either party, the military judge allowed the three to sit in on the trial, and they later testified during sentencing.

In the present appeal, Appellant maintains that the failure to sequester the witnesses was prejudicial error under M.R.E. 615. The Government concedes that there

was error but argues that no prejudice arose from the error because the witnesses' testimony was limited to victim impact evidence, which was not affected by the trial proceedings. See United States v. Spann, 51 M.J. 89, 93 (C.A.A.F. 1999) (holding that the military judge erred by applying the federal statute instead of M.R.E. 615 but finding no prejudice); United States v. Langston, 53 M.J. 335, 338-39 (C.A.A.F. 2000) (finding no prejudice arising from the military judge's failure to sequester witnesses); Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2000) ("A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

It is not necessary to address the merits of Appellant's argument to determine that no additional relief can arise from this claim. Prejudice under M.R.E. 615 is determined by considering whether the witness's testimony was affected by the trial proceedings that the witness heard. See Langston, 53 M.J. at 338; Spann 51 M.J. at 93. The three witnesses at issue testified only on sentencing. Therefore, even if their testimony was altered by what they heard at trial, the effect would not have been relevant to the members' determination of guilt. In view of our decision to reverse the sentence on other grounds, we need not address the question of prejudice.

IV. PROSECUTORIAL MISCONDUCT (GRANTED ISSUE III)

Appellant alleges that the findings and sentence should be set aside as a remedy for various incidents of

prosecutorial misconduct that took place before, during, and after his trial. Appellant claims that the lower court erred in its ruling on this issue because, despite finding that prosecutorial misconduct occurred, the lower court concluded that the misconduct did not result in prejudice and declined to grant relief on this basis. See Quintanilla, 60 M.J. at 863-67. Because we have concluded that the sentence should be set aside, we consider this issue only with respect to findings.

The lower court addressed the allegations of prosecutorial misconduct "to discourage any repetition of these actions in a rehearing." Id. at 863. We agree that it was appropriate for the lower court to comment on the conduct of Government counsel. For the following reasons, we also agree with the conclusion of the lower court that the actions of Government counsel did not prejudice the findings in this case. See United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996).

Prior to trial, assistant trial counsel engaged in an ex parte communication with the Article 32, UCMJ, 10 U.S.C. § 832 (2000), Investigation Officer. See Quintanilla, 60 M.J. at 863. Appellant raised this issue at trial as part of the basis for his request to have the Article 32, UCMJ, investigation reopened. After hearing testimony from the Investigation Officer and a witness to the conversation, the military judge denied the request, stating that the conversation gave rise to an "appearance of impropriety" but finding that the conversation had no impact on the Article 32, UCMJ, investigation. The lower court found that "this conversation did not just appear to be improper, it was improper." Id. at 864. We agree, however, with the

determination of both the military judge and the lower court that the improper conversation did not result in prejudice, particularly in light of the military judge's finding that the conversation had no bearing on the Article 32, UCMJ, investigation. See United States v. Argo, 46 M.J. 454, 457, 459 (C.A.A.F. 1997).

In a separate pretrial matter, the assistant trial counsel sent two e-mail messages to the prospective members of the panel. The e-mails advised the members of the trial schedule but were not sent to the defense. In a post-trial lecture to a capital litigation course at the Naval Justice School, the assistant trial counsel explained that he wrote the e-mail with the goal of establishing favorable opinions and trust from the members. Although this may demonstrate that assistant trial counsel had a subjective ulterior motive, an objective reading of the e-mails does not reveal this motive. Furthermore, considering the extent and strength of the evidence against Appellant in this case, these e-mails would not have influenced the members' determination of guilt.

During the court-martial, trial counsel testified on a motion and then argued the motion, relying on his own testimony. See Quintanilla, 60 M.J. at 864-65 (detailing the background of the motion). The lower court correctly concluded that this amounted to a violation of the ethical rule prohibiting attorneys from acting as both an advocate and a witness on the same matter. Id. at 865. See Dep't of the Navy, Judge Advocate General Instr. 5803.1A, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General [hereinafter JAGINST 5803.1A], Rule 3.7(a) (July 13, 1992), replaced by JAGINST 5803.1B (Feb. 11, 2000).

This motion, however, was argued in an Article 39(a), UCMJ, session outside the presence of the members, so it would not have impacted the members' findings.

Appellant also points to the assistant trial counsel's sentencing argument, which the counsel later described as "highly objectionable" during his post-trial lecture to the Naval Justice School. He engaged in tactics such as sitting on the witness stand, screaming at Appellant, and using words such as "bad hombre," "animal," and "gang-banging." Again, however, this argument did not prejudice the findings because the sentencing argument was made after the findings were entered.

The court below noted that these problems persisted after trial. Quintanilla, 60 M.J. at 865. An investigation undertaken by the Naval Criminal Investigative Service revealed that the trial counsel and assistant trial counsel impermissibly withheld evidence from the evidence custodian. Id. Given the post-trial timing of this conduct, however, it did not prejudice Appellant's court-martial. See Article 59(a), UCMJ.

Although we agree with the court below that there was no prejudice, we note that the court expressly concluded that Government counsel violated a number of ethical norms promulgated by the Navy in JAGINST 5803.1A, including: Rule 3.5a -- the prohibition against certain ex parte communications; Rule 3.7(a) -- the prohibition against an attorney acting as an advocate and attorney in the same case; and Rule 8.4 -- the prohibition against an attorney engaging in illegal and unethical conduct. Quintanilla, 60 M.J. at 864-65. The court also stated that the prosecution's sentencing argument "violated various

ethical canons." Id. at 866 (citing American Bar Association Standards for Criminal Justice: Prosecution Function and Defense Function, Standards 3-5.2, 3-5.8(c) (3d ed. 1993)). The court observed that Government counsel's "unethical conduct . . . . besmirched the military justice system . . . ." Id. at 867.

The court took note of the responsibilities of the Judge Advocate General with regard to the administration of attorney discipline, id. at 865 n.4, but it is not clear whether the specific matters, strongly condemned by the court as egregious, were referred to the Judge Advocate General for review and action. Accordingly, we direct the Clerk of the Court to transmit our opinion and the opinion of the court below to the Judge Advocate General of the Navy for appropriate consideration.

## V. CONCLUSION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed to the extent that it set aside the findings of guilty. The findings of guilty dismissed below are reinstated. The decision of the Court of Criminal Appeals is affirmed to the extent that it set aside the sentence and authorized a sentence rehearing. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority for a sentence rehearing. Thereafter, Articles 66(c) and 67(c), UCMJ, 10 U.S.C. §§ 866(c), 867(c) (2000), will apply.

**Appendix C**

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

C.L. CARVER, W.L. RITTER, C.A. PRICE

Senior Judge CARVER concurs. RITTER, Senior Judge (concurring in part and dissenting in part).

UNITED STATES

v.

UNITED STATES v. Jessie A. QUINTANILLA,
Sergeant (E-5), U.S. Marine Corps

PUBLISH
NMCCA 9801632 Decided 31 January 2005

Sentence adjudged 5 December 1996.
Military Judge: J.F. Blanche.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, 3d Battalion, 3d Marine Aircraft Wing, Marine Forces Pacific, MCAS El Toro, Santa Ana, CA.

LtCol DWIGHT H. SULLIVAN, USMCR,, Appellate Defense Counsel

Maj MICHAEL R. OSBORN, USMC, Appellate Defense Counsel

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel

LT MICHAEL NAVARRE, JAGC, USNR, Appellate Defense Counsel

LT JASON GROVER, JAGC, USN, Appellate Defense Counsel

LT ELYSIA NG, JAGC, USNR, Appellate Defense Counsel.

CDR ROBERT P. TAISHOFF, JAGC, USN, Appellate Government Counsel

LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

Capt WILBUR LEE, USMC, Appellate Government Counsel

LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel;

PRICE, Senior Judge:

This is a case about a sergeant of Marines who shot his commanding officer (CO) and executive officer (XO)

while they were in their command office suite, killing the XO and seriously wounding the CO. The appellant's sentence included the death penalty. Because the military judge committed an error that materially prejudiced a substantial right of the appellant by granting a prosecution challenge for cause, we must set aside the findings and the sentence and order a rehearing.

Contrary to his pleas, the appellant was convicted of attempted unpremeditated murder (two specifications), violation of a general order by carrying and concealing a .45 caliber pistol, premeditated murder, aggravated assault by pointing a dangerous weapon (two specifications), carrying a concealed weapon, communicating a threat, and obstructing justice. The appellant's offenses violated Articles 80, 92, 118, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, 918, 928, and 934. A general court-martial comprised of 12 members unanimously sentenced the appellant to death, reduction to pay grade E-1, and total forfeiture of pay and allowances. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's 49 briefed assignments of error and 83 summary assignments of error, the *amici curiae* brief, the Government's response, the appellant's Reply, the Petition for New Trial, the Motion for Summary Disposition, the Supplemental Assignment of Error,[1] all other appellate pleadings, and the parties' excellent oral

[1] The Motion for Leave to file Supplemental Assignment of Error is granted.

arguments. Arts. 59(a) and 66(c), UCMJ. The Petition for New Trial and the Motion for Summary Disposition are denied. While our decision as to a challenge for cause renders moot all other assignments of error, four of the additional issues warrant discussion. [2]

## I. Background

In March of 1996, the appellant was assigned to Marine Aviation Logistics Squadron 39 at Camp Pendleton, California. He worked on the night crew at the squadron, meaning that he routinely reported for work in mid-afternoon. The squadron CO was Lieutenant Colonel (LtCol) Thomas A. Heffner, United States Marine Corps (USMC). The XO was LtCol Daniel W. Kidd, USMC.

On the morning of 5 March 1996, the appellant consumed an undetermined quantity of alcohol, then left his home to drive to work. When he left his car parked in the squadron parking lot, he had a .45 caliber pistol tucked into his clothing. The appellant entered the squadron spaces, walked upstairs to the command office suite, then waited outside the XO's office until other Marines left.

A uniform inspection was scheduled for the night crew at 1500. In preparation for the inspection, LtCol Heffner

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[2] In our opinion, we will use various acronyms, including TC - trial counsel (prosecutor), MJ - military judge, IMC - individual military counsel (trial defense counsel selected by the appellant), and ADC - assistant defense counsel. Other acronyms are defined in the course of the opinion.

was changing into his dress uniform, in a changing room located next to LtCol Kidd's office, where LtCol Kidd was working at his desk.

The appellant walked into LtCol Kidd's office, pulled out his pistol, asked him, "Remember me, f er?" and then shot the XO as he tried to exit the office through the door into the changing room. The bullet entered the right side of his lower back, exited the right front side of his abdomen, and then amputated his right ring finger. LtCol Kidd managed to stagger into the changing room, with the appellant close behind him.

LtCol Heffner was changing uniforms when the door to the changing room burst open and LtCol Kidd rushed in. LtCol Heffner first glanced at his XO, and then noticed the appellant in the doorway. The appellant raised his pistol and shot LtCol Heffner in the chest, at which point LtCol Heffner ran out of the office suite. The appellant then shot LtCol Kidd again, the bullet entering his upper back. LtCol Kidd collapsed to the floor and bled to death within a matter of minutes.

After the third and fatal shot was fired, the appellant left the office suite and followed the bloody trail left by LtCol Heffner. As he moved down the passageway, he confronted Gunnery Sergeant (GySgt) W.J. Till and Staff Sergeant (SSgt) A.L. Karr. The appellant pointed the pistol at both Marines but did not fire.

By this time, LtCol Heffner was lying just outside one of the ground floor entrances to the building. Various Marines were providing first aid to their CO. GySgt W.E. Tiller was there and heard someone ask where the

XO was. He then went up to the second floor to find the XO. As he proceeded down the passageway toward the command office suite, he saw the appellant a few feet away. GySgt Tiller stepped toward the appellant and reached for the gun. The appellant raised the gun toward GySgt Tiller and fired. GySgt Tiller avoided the shot and struggled with the appellant, eventually disarming him.

The appellant broke away from GySgt Tiller and went down the stairs to the ground floor to the Production Control Office. A number of senior enlisted Marines were in the office at the time. When the appellant entered the office, none of them knew what had just happened. The appellant said, "Gunnery Sergeant, apprehend me, I just shot the CO and XO," or words to that effect. GySgt P.T. Sullivan asked the appellant to sit down, and he did so.

Soon other Marines entered the office. The appellant talked about why he shot the CO and XO, complaining that he wasn't treated well in the squadron and that he did it for his "brown brothers," or words to that effect. At one point, the appellant stood up, pulled down his coveralls, took off his undershirt, and displayed the tattoos that covered his upper body. One of the large tattoos read "Sureno," which the Government argued was a reference to Southern California gangs. Shortly thereafter, a military policeman arrived and took the appellant into custody.

**II. Factual and Legal Sufficiency of the Evidence**

Four of the assignments of error assert that the evidence

is insufficient to sustain various findings of guilty, including the finding of guilty to premeditated murder of LtCol Kidd. Before we address the challenges for cause and other issues, we will resolve these four assignments of error to ensure that a rehearing will not violate the appellant's right against double jeopardy. *See* Arts. 44(b) and 66(d), UCMJ. We will also perform our statutory duty to determine whether the evidence is sufficient as to every other offense of which the appellant stands convicted. *See* Art. 66(c), UCMJ.

This court's standard of review for sufficiency of the evidence is set forth in Art. 66(c), UCMJ:

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

Under Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the

evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 [] (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

We conclude that a reasonable factfinder could properly have found, beyond a reasonable doubt, that the appellant committed each of the offenses of which he stands convicted. Moreover, after careful consideration, we are convinced beyond a reasonable doubt that the appellant committed each of those same offenses.

**III. Challenges for Cause**

Following voir dire, the trial counsel challenged two members of the court-martial panel, LtCol C.W. D'Ambra, USMC, and Master Sergeant (MSgt) R.T. Buckham III, USMC, for cause, citing their religious faith and reliance on prayer in deliberating on a potential death penalty. The military judge granted both challenges for cause, opining that "based on their strongly held religious beliefs they will have difficulty in considering the entire range of punishments in this case." Record at 1527. The appellant contends that the military judge committed reversible error by granting the

Government's challenges for cause. We disagree as to LtCol D'Ambra. We agree as to MSgt Buckham.

A. BACKGROUND

To set the scene for our discussion of these challenges for cause and the ruling of the military judge, we will quote extensively from the record. The parties conducted thorough and probing individual voir dire of these members. We will begin with pertinent extracts from the colloquy with LtCol D'Ambra:

> TC: Let me rephrase it, sir. If the government meets all of its burdens in this case, . . . can you seriously consider the death penalty in this case?
> Mbr: I can consider it.. . .
>
> Q: Do you have any strong feelings -- and, again, I'm going back to your questionnaire when you say "mixed." Do you have any leanings one way or another that you feel will give you trouble considering the death penalty?
>
> A: Well, I am not sure, Jake, what you're driving at. Basically it would be religious -- for religious reasons, whether I am -- I just can't make that decision at this time over something I was afraid of whether I could actually vote for a death penalty. I mean, I certainly feel that it is justified but it's the other side that contradicts whether it is ever warranted.. . . .
>
> Q: Sir, I notice from your questionnaire you are -- you're a practicing Catholic.

A: Yes.

Q: Is there anything about that, your religion, that will prevent you from seriously considering the death penalty should the government, again, meet all of its burdens in this case?

A: Well, as far as I know the Catholic church does -- is against the death penalty. But, again, it all goes to a conscious decisions [sic] I'll have to make and it's just something that I'll have to wait and consider.

Q: Will you have difficulty considering the death penalty, should the government meet all of its burdens, because of your religion?

A: I don't know if I'll have difficulty but it's going to be something that I'll have to wrestle with, yes.

Record at 1209-11.

The trial defense counsel followed up with additional questions. LtCol D'Ambra confirmed that he would consider the death penalty and not rule it out. However, the defense never fully rehabilitated this member regarding his misgivings about the death penalty.

We now turn to MSgt Buckham. Extracts from his individual voir dire follow:

TC: I want to talk to you just a little bit about your religious convictions. I notice either you are a deacon or you were selected as a deacon. Is that correct?
MBR: At that time I was nominated or -- nominated as a deacon and now I'm currently serving as a deacon in our church.

Q: Okay. And that's a Baptist church?
A: Yes, sir.

Q: What type of Baptist? American Southern Baptist?
A: We're -- it's -- we're part of the Baptist General Conference.. . . .

Q: Now, do you know what the church's stand or what their plank is on the death penalty?
A: Our -- to the best of my knowledge, our church has no official position.

Q: Have you ever discussed that in church or discussed that in some Bible studies, stuff like that, conversations like that, the death penalty?
A: Not that I recall, sir.. . . .

Q: Okay. Describe for me generally the death penalty in the biblical context.
A: Well, sir, I certainly haven't formed a conviction of what the Bible says about the death penalty. . .

Record at 1391-92.

The trial counsel and MSgt Buckham then discussed in great detail Biblical teachings on the death penalty, focusing on the account in the New Testament of the woman taken in adultery and presented to Jesus for judgment. *See John* 8:2-11.

The colloquy continued:

> Q: Do you think from that parable of the Bible and that story that Christ has forbidden you, if you believe in Christianity from voting for the death penalty?
> A: I don't believe that is particularly something that would go into building a conviction about the death penalty.
>
> Q: Is there –
> A: Not -- I do not -- I don't believe that that prohibits me from thinking that the death penalty is a valid action.
>
> Q: Okay. I got the impression there was something else that you were going the [sic] say. Is there maybe something else there that would prohibit you from considering that?
> A: No, sir.
>
> Q: Nothing else in the New Testament? Anything else in the Bible that you think makes you kind of

sit back and say, you know, I'm not sure we should be doing this?
A: No, sir. I believe the death penalty is a not often used means of -- of -- of a penalty, that if -- if warranted, is just. And I also think it is a -- is a factor in society that would prohibit others from doing like crimes.

Q: Let me ask you this: As a Christian, do you pray about important decisions?
A: Yes, sir.

Q: Significant decisions, you seek direction from God?
A: Yes, sir.

ADC: Sir, objection. At this point, I think we're getting way too personal with the Top. These are personal convictions that don't need to be aired in this courtroom.

MJ: Sustained. Let's move on.

ATC: Generally, sir -- I'll back off from that. But the one question I wanted to get to, sir, was whether in this case the Master Sergeant felt that when he voted for death or not to vote for death, whether he would consider that a decision he would need to pray about.

MJ: All right. You can ask that question.

Voir dire by the prosecution (continued):

Q: Does that question kind of make sense to you, Master Sergeant?

A: Sir, would you ask the question again, please.

Q: When you go back in that deliberation room and you're all talking about -- if we ever get to that point, okay, and you are deciding whether to vote for the death penalty for Sergeant Quintanilla or vote against the death penalty, is that a decision that you feel that is one of those important decisions that we just talked about that you would actually pray about and seek direction from God about?

A: Sir, my -- my aim is to live my life in prayer through the meditation of God's word and the application of that word on a daily, even hourly basis. So in answer to that question, yes, I would make it a matter of prayer.

Q: I'm certainly not trying to give you the impression that you shouldn't do that at all.
A: Understood, sir.

Record at 1394-95.

The defense followed up on the same theme:

ADC: Top, I take it from your discussion from Captain Feldman that you possess a great personal faith and that faith is a very high priority

in your life; correct?
A: That's correct, sir.

Q: And when asked about would you weigh this -- would you have to pray about this decision, I take it from the way you live your life you pray about all weighty decisions and that's a part of who you are. Fair enough?

A: Yes, sir.. . . .

Q: And if Lieutenant Colonel Blanche tells you how this case shapes up, if the death penalty is a valid and authorized penalty, then you have to be able to consider that and be able to possibly do that. Are you able to do that, Top?

A: To consider what the judge –

Q: Right. Exactly. If Colonel Blanche tells you that the death penalty may be authorized in this case, and this [is] an authorized punishment, you have to be able to consider using the death penalty or ordering the death penalty. Can you do that?

A: Yes, I can, sir.

Record at 1396-97.

Following individual voir dire of other members, the court-martial recessed for 46 minutes. The Government then offered its challenges for cause:

TC: Sir, we would challenge Lieutenant Colonel D'Ambra.

MJ: Let me hear your basis for him first.

TC: Yes, sir. Our basis would be in his discussion about his religious faith and that he would need to pray about his decision in regard to the death penalty. It's an obvious notation that he's a practicing Catholic and the Catholic churches oppose to [sic] the death penalty.

We believe that would certainly leave the impression that he could not seriously consider that -- the fact -- I think it works both ways in this case. The fact if he's praying about this decision or feels his religious decision is that, in fact, he should give the death penalty or shouldn't give it, that's not going to be based on the evidence presented in this case but on a more personal side of the house in his prayer life, I guess is better words.

MJ: Okay. Defense, do you oppose this challenge for cause?

IMC: Yes, sir, we do. Lieutenant Colonel D'Ambra states that he can consider the death penalty. He thinks it does have a place in our society. Simply by the fact that he may need to pray over a big decision shouldn't excuse him, sir. We take that into court when we make our decisions. Members take their real life experience

and use that to make their decisions. He clearly could consider in that.

MJ: Government, your next challenge for cause, if any?

TC: Master Sergeant Buckham. Again, same similar issues on that one, sir. Again, he discusses about seeking guidance from God, praying about that decision.

I would also note for the record his very emotional response when faced with that, his eyes watering up, serious consideration and delay in responding to those questions. It obviously shows a very concerned attitude over that issue. If, in fact, he's that emotionally distraught with the voir dire process, imagine when we're at sentencing, even as Captain Bellon described the magnitude of victim impact evidence and controlling those emotions. If he's having a difficult time at this point certainly when we're at that stage of the trial he's going to be faced with that same or similar difficulty.

MJ: All right. Response.

IMC: We object to that, sir. It's not a basis for a challenge for cause. He states he feels the death penalty is a deterrent. He's not prohibited from imposing the death penalty by any religious beliefs. There's nothing in his biblical studies that would restrict him from imposing the death penalty. He could consider it. Simply because

he's emotional and he may pray about something, the same arguments before with the Lieutenant Colonel, sir. You shouldn't excuse him. It's not a basis for any challenge for cause.

MJ: Well Captain Mulcahy, what about his visual demeanor in court when posed that question?

IMC: Sir, there's no substantial doubt as to if he's sitting on the court as a member as to legality, fairness and impartiality, and that's what R.C.M. 912 says as a basis for a challenge. He simply was somewhat emotional realizing it's going to be an important decision but in no way -- no which prohibit him and it's not a basis for a challenge, sir.

MJ: Are you -- you are not challenging the fact that he did have a visual reaction to that particular question then; correct?

IMC: We're not sure why he had that particular reaction, sir. Sir, there really isn't any evidence of why he had the reaction he was. Possibly it was from Captain Bellon's [sic] questions or confrontations. We're not sure what started him on his reaction, sir.

MJ: Okay. Trial counsel, your next challenge, if any?

Record at 1520-22. After hearing all challenges for cause from both sides, the military judge took a recess to consider them. He then ruled as follows:

> The challenges for cause against Lieutenant Colonel D'Ambra . . . Major [sic] Buckman [sic] . . . are all granted.
>
> Based on the guidelines of R.C.M. 912(f)(1)(N), it is my mandate as military judge to ensure that this court-marital [sic] be free from substantial doubt as to fairness and impartiality of the members. Applying this guidance based on the responses by Lieutenant Colonel D'Ambra and Master Sergeant Buckman [sic] -- and Master Sergeant Buckman's [sic], *the court opines that based on their strongly held religious beliefs they will have difficulty in considering the entire range of punishments in this case.*

Record at 1527 (emphasis added).

B. STANDARD OF REVIEW

Normally, "a military judge's ruling on a challenge for cause is given 'great deference'." *United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). However, in a capital case, we are reminded that "death is qualitatively different." *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)(Stewart, J., plurality opinion). For that reason, while we accord the military judge deference in our review of his rulings on challenges for cause, we are not willing to allow him "great" deference in this capital case. *See United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994)("removal of a potential juror

on the basis of opposition to the death penalty is subject to heightened scrutiny")(citing *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988)).

As stated in the most recent capital case-opinion issued by our superior court, a military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. *United States v. Gray*, 51 M.J. 1, 32 (C.A.A.F. 1999). We will reverse for an abuse of discretion "if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)(citing S. Childress & M. Davis, 2 FEDERAL STANDARDS OF REVIEW § 11.10 (2d ed. 1992)).

C. DISCUSSION

Jurors may not be removed simply because they express "conscientious or religious scruples" against the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968). The test for removal of a court-martial member based on opposition to the death penalty is "whether the [member]'s views would 'prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath.'" *Gray v. Mississippi*, 481 U.S. 648, 658, 95 L. Ed. 2d 622, 107 S. Ct. 2045 (1987)(quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985)); *Gray*, 51 M.J. at 32.

We now turn to the military judge's ruling on the challenges against LtCol D'Ambra and MSgt Buckham.

His rationale in granting both of these challenges was that the members would have difficulty considering the full range of possible punishments because of their strongly held religious beliefs. Although his reference to the "entire range of punishments" presumably included restriction, reduction in rate, reprimand, etc., nothing in the voir dire of these members alluded to any punishment other than death. Thus, we conclude that the military judge's reference to all possible punishments was merely a euphemism for the death penalty. We are left, then, with his finding of fact that their strongly held religious beliefs would be a substantial influence, in some degree, in their consideration of the death penalty, should capital sentencing become an option

As to LtCol D'Ambra, the military judge's finding was not clearly erroneous. This member explained that he was a Catholic and that he understood his faith to disapprove of the death penalty. He went on to say that, for religious reasons, he was not sure he could vote for the death penalty. In fact, he said that, owing to his religious beliefs, he would have to wrestle with a potential death penalty. The trial counsel cited those beliefs in support of his challenge, but erroneously argued that LtCol D'Ambra would have to pray about his decision and place undue reliance on divine guidance in his deliberations. In fact, LtCol D'Ambra said nothing about prayer. Apparently, the trial counsel confused LtCol D'Ambra's responses with MSgt Buckham's statements about prayer. Unfortunately, the individual military counsel did not correct the trial counsel's misstatement. The military judge correctly noted LtCol D'Ambra's religious qualms about the death penalty in his ruling and said nothing about whether LtCol

D'Ambra would pray about his vote on sentencing. In sum, the military judge accurately described LtCol D'Ambra's responses during the individual voir dire.

However, we are not so confident about the military judge's articulation of the legal test for granting the challenge against LtCol D'Ambra. The military judge found that he would have "difficulty in considering the entire range of punishments in this case." Record at 1527. That is not the correct test. We expect that many, if not most, conscientious members in a capital case would have some difficulty in voting to condemn a fellow Marine to die. Rather, the test is "whether the [member]'s views would 'prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath.'" *Gray*, 481 U.S. at 658 (quoting *Wainwright*, 469 U.S. at 424); *Gray*, 51 M.J. at 32. If LtCol D'Ambra's responses had not so clearly indicated his failure to pass the correct legal test, although not correctly articulated by the military judge, we would have difficulty deferring to his decision. However, since LtCol D'Ambra's religious views clearly would have prevented or substantially impaired his ability to consider and vote for the death penalty, we conclude that the military judge did not abuse his discretion in granting the challenge for cause.

MSgt Buckham is another matter. As to this member, the military judge not only misstated the legal test, he clearly erred in his finding of fact. MSgt Buckham never said, nor even intimated, that he would have difficulty considering the death penalty. Rather, he explained that he considered it to be a just punishment that would tend to deter others from committing murder. He specifically

disavowed any opinion that the Bible or his church took a position on the death penalty. While he candidly stated that he would pray about imposing the death penalty, nothing in his responses indicated that prayerful consideration of divine guidance would prevent him from following the instructions of the military judge or abiding by his oath.[3] Finally, MSgt Buckham indicated, without equivocation or reservation, that he could consider imposing the death penalty.

Contrary to the foregoing responses, the military judge found that "based on . . . strongly held religious beliefs [MSgt Buckham would] have difficulty in considering the entire range of punishments." *Id.* at 1527. This finding is clearly erroneous. MSgt Buckham never expressed any strongly held religious beliefs on the death penalty. Moreover, he never indicated any difficulty considering the death penalty.

In oral argument, the Government emphasized one statement in MSgt Buckham's questionnaire. In response to a question about his general feelings concerning the death penalty, MSgt Buckham wrote:

> Generally that the death penalty's use by a court is the ultimate expression of divine sovereignty through human instruments of justice. That to a people who know not this divine sovereign and

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[3] We decline to resolve the constitutional issues discussed in the *amici curiae* brief regarding religion and selection of court-martial members. Suffice it to say that we are unaware of any rule of law that renders religious affiliation, belief, or practice *per se* incompatible with a member's oath or affirmation.

> do not understand their use as an instrument of his judgement [so] that the death penalty is not effective. It is not effective because it is not enforced and it may not be administered justly.

Appellate Exhibit CXIII at 422. The Government contends that this statement casts substantial doubt about his ability to consider the death penalty. We disagree. First, we find that the questionnaire comment is unclear as to its meaning and import. Second, any qualms expressed in the comment were certainly clarified and refuted during the extensive individual voir dire. It is particularly noteworthy that the Government did not bother to question MSgt Buckham about the questionnaire comment during the voir dire, nor did the Government challenge him on that basis, thus indicating no particular concern about the import of that comment.

In oral argument, the Government also made much of MSgt Buckham's in-court demeanor during the individual voir dire, arguing that his "very emotional response" to questions about the death penalty showed that the member could not truly consider that punishment. Record at 1521. The trial counsel described his demeanor as "his eyes watering up, serious consideration and delay in responding to those questions." *Id.* When pressed by the military judge, the trial defense counsel observed that there was no evidence explaining the motive or basis for the emotional reaction and opined that it may have stemmed from "[trial counsel's] questions or confrontations." *Id.* at 1522. We note that neither counsel nor the military judge chose to call the member back in for additional

questioning to clarify the basis for his emotional demeanor.

We need not speculate regarding MSgt Buckham's emotional demeanor because he has explained it in an affidavit attached to the Petition for New Trial. In pertinent part, we now quote from the affidavit:

8. The emotional responses that the military judge, trial counsel and defense counsel alluded to on the part of affiant had nothing to do with affiant's feelings about the death penalty, but instead were a *direct result of the emotional climate that was set in the courtroom by the probing, invasive and personal questioning by trial counsel* of affiant concerning affiant's religious beliefs.

9. Affiant questioned then and now the intent of the trial counsel in asking the types of questions that he was asking and the "digging" manner in which they were being asked.

10. Affiant sensed that trial counsel was attempting to imply that affiant's religious beliefs would somehow delay the court-martial and the members' deliberations because affiant would have to stop the proceedings to pray about any decision that he would have to make.

11. Affiant did respond emotionally to trial counsel's implied assertion that affiant's religious beliefs would impede his ability to sit as a member of a court-martial to which affiant had been detailed *and for no other reason.*

MSgt Buckham Affidavit of 19 Feb 1999 (emphasis

added). There being no reason to question this sworn statement, we accept it as a perfectly understandable and rational explanation of his emotional demeanor, particularly in view of the prosecutorial tactics employed in this court-martial, as discussed below. Moreover, if the military judge did consider MSgt Buckham's emotional demeanor in deciding the challenge, we note that the military judge did not cite it as a basis for his ruling. Thus, we conclude that MSgt Buckham's emotions had nothing to do with his views regarding the death penalty.

Having concluded that the military judge abused his discretion in granting the Government's challenge against MSgt Buckham, we now consider the extent of the prejudice and the appropriate remedy. The appellant argues that "the correct remedy for the improper exclusion of a member in a contested case is to set aside the findings and sentence while authorizing a rehearing." Appellant's Brief of 12 Aug 2003 at 35 (citations omitted). Because the brief supports this argument in such a clear and succinct manner, we quote from it:

> The improper exclusion of a member is particularly harmful in a military capital case, where a death sentence requires three unanimous votes, one during the findings stage and two during the sentencing stage, after which every member still retains the complete discretion to reject the death sentence. Thus, the improperly-granted challenge had the practical consequence of ceding a vote to the government at each of the four death penalty gates. . . . We will never know

> [how the voting might have been different] because the military judge erroneously excluded MSgt Buckham from the panel. Accordingly, Sgt Quintanilla must be retried before a properly selected panel.

Appellant's Brief at 35-36 (internal citations omitted).

The Government argues that "the proper remedy would be to simply disapprove the death penalty aspect of Appellant's sentence and approve the lesser sentence of life without parole." Government Brief of 11 Mar 2004 at 51-52. The Government relies on *Adams v. Texas*, 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980), where the United States Supreme Court held that where one prospective juror was improperly excluded by the trial court due to qualms about the death penalty, the findings of guilty would be affirmed but the death sentence would be set aside. One year later, the Supreme Court clarified *Adams*, by holding that, in such a scenario, harmless error analysis cannot apply and that reversal as to the death sentence is automatic. *Gray*, 481 U.S. at 667-68. We note that, as in *Adams*, the Court declined to set aside the findings of guilty.

We are persuaded by the appellant's argument and by military case law set forth after these United States Supreme Court decisions. In *United States v. Giles*, 48 M.J. 60 (C.A.A.F. 1998), the appellant pleaded not guilty to various drug charges. Following voir dire, the defense counsel challenged a member for cause based on an inelastic attitude about the imposition of a punitive discharge. The military judge denied the challenge. The defense counsel properly preserved the

issue by stating that he would have used his peremptory challenge against a different member if the challenge for cause had been granted. On appeal, the Court of Appeals for the Armed Forces held that the military judge abused his discretion. Despite the fact that the issue went solely to sentencing, our superior court set aside the findings as well as the sentence, without elaboration. *See United States v. Greene*, 36 M.J. 274, 282 (C.M.A. 1993)(setting aside findings and sentence where military judge erred by granting prosecution's peremptory challenge without offering race-neutral reason); *but see United States v. Jobson*, 31 M.J. 117, 120-21 (C.M.A. 1990)(holding if a military judge erred in denying a defense challenge for cause against a member who knew of the pretrial agreement, the appellant would be entitled to a rehearing on sentence).

This court followed *Giles* and set aside the findings and sentence in *United States v. Pritchett*, 48 M.J. 609 (N.M.Ct.Crim.App. 1998). *Pritchett* was another contested non-capital case before members where we concluded that the military judge committed prejudicial error by denying the appellant his statutory right to a peremptory challenge against new members. After holding that such an error would be presumed prejudicial, we reasoned that under the facts in that case, the presumption had not been rebutted. Our reasoning included this salient comment: "'The reason prejudice is presumed from such an error of law is that this Court has no way to determine how the ineligible member voted or whether his vote may have controlled the sentence imposed by the court.'" *Pritchett*, 48 M.J. at 613 (quoting *United States v. Lenoir*, 13 M.J. 452, 453 (C.M.A. 1982)).

If this reasoning applies to errors in rulings on member challenges in non-capital cases, we think it applies with greater force and effect in a capital case such as this, where the appellant's life might be spared on any of three or four different votes taken during the findings and the sentencing phases of trial. Since the military judge erroneously permitted the Government to remove MSgt Buckham, as the appellant argues so persuasively, we will never know if any of those votes might have been different. We hold that military due process requires us to set aside the findings as well as the sentence.

**IV. Prosecutorial Misconduct**

In two assignments of error and the supplemental assignment of error, the appellant asserts that, because of prosecutorial misconduct, the findings and sentence must be set aside. While we strongly disapprove of the actions of the trial counsel and assistant trial counsel, we conclude that the appellant was not prejudiced. Even though we set aside the findings and sentence on another ground, we discuss prosecutorial misconduct to discourage any repetition of these actions in a rehearing.

The first incident occurred before the trial commenced and involved an *ex parte* communication. Following the Article 32, UCMJ, investigation, the assistant trial counsel, Major (Maj) G.P. Glazier, USMC, had a brief conversation about the case with the Article 32 Investigation Officer (IO) outside the presence of any defense counsel in this case.

Prosecutorial misconduct consists of "'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'" *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)(quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). In evaluating an assertion of prosecutorial misconduct, we focus on the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness." *Thompkins*, 58 M.J. at 47 (citing *Smith v. Phillips*, 455 U.S. 209, 220, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982)). If the prosecutor violated some legal norm, and if that violation impacted on some substantial right of the appellant, we must still consider the record as a whole to determine whether the violation was harmless under all the circumstances of a particular case. *Meek*, 44 M.J. at 5.

This incident comes to our attention as an *ex parte* communication by a prosecutor. An *ex parte* communication is one "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." BLACK'S LAW DICTIONARY 597 (7th ed. 1999). As set forth by the Judge Advocate General of the Navy, the rule against *ex parte* communications prohibits Navy and Marine Corps judge advocates serving as trial counsel (prosecutors) and defense counsel from taking the following actions:

> (1) seek to influence a judge, court member, member of a tribunal, prospective court member

or member of a tribunal, or other official by means prohibited by law or regulation; [or]

(2) communicate ex parte with such a person except as permitted by law or regulation;

. . . .

Judge Advocate General Instruction 5803.1A, Rule 3.5a (13 Jul 1992). Thus, the general rule is that an advocate cannot communicate with a judge or "other official," such as an IO, in a court-martial about a particular case in the absence of opposing counsel or without advance notice to, and consent of, that opposing counsel. Even when opposing counsel has been notified, such communications should be restricted to administrative matters that have no bearing on the substantive issues of the case.

Our superior court has held that an Article 32, UCMJ investigation is a "judicial proceeding" in which "ex parte communications between the investigating officer and the prosecution are improper." *United States v. Holt*, 52 M.J. 173, 183 (C.A.A.F. 1999)(citing *United States v. Argo*, 46 M.J. 454, 458 (C.A.A.F 1997)). Based on our review of the record, we concur with the military judge's conclusion that Maj Glazier's brief conversation with the IO was "ill advised" and certainly gave rise to an "appearance of impropriety." Record at 869-70. However, we also conclude that this conversation did not just *appear* to be improper, it was improper. There was no lawful reason for Maj Glazier to communicate with the IO about the investigation, particularly when all the evidence had been taken and the IO would next be

considering the evidence and making his recommendations. Nonetheless, we hold that the conversation had no impact on the IO's report or recommendations or on the eventual trial in this case. Based on our review of the record, we are confident that the appellant was no worse off because of Maj Glazier's behavior than if Maj Glazier had conducted himself in accordance with the law and applicable ethical canons. Accordingly, the appellant is not entitled to relief on this ground.

Unfortunately, this was not the only prosecution misstep in this capital case. Because of the nature and number of such missteps, some of which are detailed in the Supplemental Assignment of Error and the Petition for New Trial, we feel compelled to discuss some of them.

The first is the trial counsel's argument on a motion as to which he also offered testimony. The trial counsel in this case was Captain (Capt) C.E. Feldman, USMC. To understand the issue, we first summarize the background. Hours after the shootings, the appellant was detained in the brig in pretrial confinement. A hearing was held to determine whether legal grounds existed to continue that pretrial confinement or whether the appellant should be released from that status. Capt Feldman represented the Government and the unit at this hearing. Capt D.G. Bellon, USMC, represented the appellant. Those in attendance included five or six representatives from the media, including at least one local television station. The prosecution team had no prior knowledge that media representatives would be present for the hearing. During the hearing, Capt Feldman presented witness statements to justify

continued pretrial confinement. He did so by delivering copies to the Initial Review Officer (IRO) and to Capt Bellon, then reading aloud from the statements. The defense objected to the reading from the documents in front of the media, fearing that the media would publish the substance of the statements and potentially taint the pool of potential members in the Camp Pendleton area. The hearing officer asked Capt Feldman to stop reading, which he did. Nevertheless, as the defense feared, media representatives did publish the substance of the statements. Later, during voir dire, every member revealed that he/she had been exposed to media accounts of the shootings and investigation, although it was not clear whether the members had read or seen media accounts of this particular hearing.

Based on this and other actions by the prosecution team, the defense filed a pretrial motion to dismiss all charges based on prosecutorial misconduct. Among other evidence, Capt Feldman testified for the Government regarding his participation in the pretrial magistrate's hearing. Following direct examination, he was cross-examined on that issue. He later presented argument on the same motion addressing, in part, his own testimony. Thus, Capt Feldman both testified and argued on a contested issue. We note that in making that argument, he specifically addressed his own testimony and the propriety of his own actions.

In doing so, Capt Feldman violated the ethical rule against attorneys acting as an advocate and witness in the same matter. JAGINST 5803.1A, Rule 3.7(a) (13 Jul

1992).[4] The only arguable exception to that rule in this case applies for testimony regarding "the nature and quality of legal services rendered in the case." *Id.* However, although his testimony on the issue was certainly appropriate, there was no need for him to make argument on that testimony, particularly where two other prosecutors were available to present the argument. We note that the defense team did not object to this ethical violation, apparently concluding that no prejudice occurred. Based on our review of the record, we concur that no prejudice occurred, but do not condone yet another example where a prosecutor ran out of his lane.

The next, and most egregious, incident that merits discussion is Maj Glazier's unauthorized withholding of evidence from the evidence custodian. Without exploring all the details, suffice it to say that a Naval Criminal Investigative Service (NCIS) report attached to the Petition for New Trial demonstrates to our satisfaction that:

1. Following the adjournment of this court-martial, Maj Glazier and Capt Feldman gave the bullet that pierced LtCol Heffner's chest to him. This was done at the request of LtCol Heffner.

2. Maj Glazier gave the ring LtCol Kidd was wearing at the time of his murder to his widow, Mrs. Kidd.

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[4] As noted above, our judicial duties require us to determine if a prosecutor's conduct violates any ethical canon. Our judicial determination does not usurp the province of the Judge Advocate General under the Instruction to decide whether sanctions would be appropriate for the same conduct. *See* JAGINST 5803.1A, Encl.2 (13 Jul 1992).

3. Maj Glazier kept a knife seized from the appellant for himself.

4. Maj Glazier withheld the pistol used by the appellant in the shootings. Capt Feldman later received the pistol, mounted it on a plaque, and hung it in his office, where he served as a Deputy District Attorney in Steamboat Springs, Colorado. The plaque was engraved as follows: "Capt Charles Feldman and Maj Guy Glazier, Sureno Busters."

5. Neither Maj Glazier nor Capt Feldman had any permission or authority for their actions.

6. During the investigation, each of the items were returned to the Naval Criminal Investigative Service.

It goes without saying that it is highly unethical, if not illegal, for prosecutors to take or withhold evidence, without authority, in a court-martial, and convert it to their personal use or that of others. *See* JAGINST 5803.1A at Rule 8.4. This is particularly true in the military justice system where a conviction is inchoate until the convening authority takes his action on the case, and not final until this court completes its review under Articles 59(a) and 66(c), UCMJ. Moreover, in a capital case such as this, review by our superior court is mandatory. Art. 67(a), UCMJ. Thus, evidence admitted at trial must be preserved under established evidence custody rules until such time that appellate review is final.

We rebuke Maj Glazier and Capt Feldman for their

actions and trust that no Navy or Marine Corps prosecutor will follow their bad example. Testing for prejudice, we conclude that the prosecutors' post-trial actions had no impact on the findings and sentence.

We cite one last example of questionable prosecutorial conduct that occurred during Maj Glazier's sentencing argument. Maj Glazier described the incident at a presentation he made to the Government Capital Litigation Course at the Naval Justice School in March and May of 1997:

And I'm getting louder and louder and louder and the members who are starting to go to sleep on me are saying, "Boy, this is really building. What is he getting to?" And then I get down to my objectionable stuff, you know, you're getting louder and I'm moving and I'm moving around the courtroom too. I'm up in front of the members when I'm starting my closing argument and I'm loud and I'm in their face but I'm not near the accused, I'm up with the members. And then I'm backing off, I'm softer and I'm softer and I'm talking about the victims and the impact on them and I'm getting further away from the jury. It's hard for them to hear me. They're straining to listen. *I get over, I actually take a seat on the witness stand, which is highly objectionable, and I start talking about what Colonel Kidd would have testified to if I could have called him as a witness.* And then, as I'm building this crescendo, I get off the witness stand and I go over to the accused . . . and I start talking about, you know, "We do remember you. Gentlemen, answer that question." And by the time I get down to the bottom, *I'm screaming, I'm right in the accused'[s] face and I'm pointing at him, "You're that gang banging,*

*murdering animal who literally tore the heart out of a man.* Tore the heart out of a family. Tore the heart out of the squadron. Tore the heart out of the eagle on that flag over there. We remember you, by God, we remember you."

Appellant's Motion to Attach of 19 Apr 2001, Glazier Transcript IV of 29 May 1997 at 45-46 (emphasis added). Maj Glazier's description is corroborated by the record and by a post-trial clemency request. Record at 3032-33; LtCol G.S. Barthel ltr of 10 Feb 98 at P14.

As Maj Glazier observed, his sentencing argument was highly objectionable, violating various ethical canons. The American Bar Association Standards for Criminal Justice state that "the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom." Prosecution Function Standard 3-5.2(a). In other words, Maj Glazier's overbearing, intemperate, and deliberate conduct and language improperly tended to inflame the passions and possible prejudices of the members and placed the fairness of the sentencing proceedings in jeopardy. *See United States v. Barrazamartinez,* 58 M.J. 173, 176 (C.A.A.F. 2003); Prosecution Function Standard 3-5.8(c).

The ADC made a timely objection to Maj Glazier's entire sentencing argument, focusing on the words used, namely "bad hombre," "animal" (three times), "gang-

banging" (twice) and "drive-by shooting" (twice). The military judge sustained the objection and gave a curative instruction. The members stated they understood the instruction and agreed to follow it. Presuming that the members did indeed follow the instruction in their deliberations, we conclude that these references had no impact on the sentence. *See United States v. Garrett*, 24 M.J. 413, 418 (C.M.A. 1987). Nonetheless, Maj Glazier's argument was an affront to principles of justice and fair play.

We do not begrudge an advocate's effort to influence the members and the military judge to accept his/her arguments on the facts and the law. That is what advocates are expected to do. *See Barrazamartinez*, 58 M.J. at 176 (C.A.A.F. 2003)(citing *United States v. Nelson*, 24 C.M.A. 49, 1 M.J. 235, 238, 51 C.M.R. 143 (C.M.A. 1975)). In fact, it is beyond cavil that prosecutors and defense counsel should be zealous in their advocacy. But, such zealous advocacy must be kept within the bounds of law, military regulation and ethical rules.

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with

humility.

United States Att'y Gen. Robert H. Jackson, Address at the Second Annual Conference of United States Attorneys at 4-5 (Apr. 1, 1940).

We understand that the facts of this case cry out for justice for the appellant's heinous crimes, particularly as to LtCol Kidd and LtCol Heffner. We also understand the zeal displayed by Maj Glazier and Capt Feldman throughout this court-martial. But there is a line between zealous prosecution infused with righteous indignation, on the one hand, and unethical conduct, on the other. These two judge advocates crossed that line on several occasions in this capital court-martial. In so doing, they jeopardized the integrity of the trial proceedings and besmirched the military justice system in the United States Marine Corps.

**V. Sequestration of Witnesses**

In a motion for summary disposition and in the first assignment of error, the appellant asserts that the military judge committed reversible error by allowing three of the victims' family members who testified in sentencing to observe the entire trial from the spectator gallery. We agree that the military judge committed error, but hold that it did not prejudice the appellant. *See United States v. Spann*, 51 M.J. 89, 93 (C.A.A.F. 1999).

**VI. Appellate Delay**

The appellant asserts that combining the death penalty with the extended period of confinement already served

is cruel and unusual punishment. Citing no binding federal or state authority, he argues that this combination produces great mental anxiety and suffering that violates the Eighth Amendment and Art. 55, UCMJ. We disagree, but the length of appellate delay itself warrants discussion.

The appellant was sentenced on 5 December 1996, the convening authority took his action on 29 July 1998, and the case was docketed at this court on 5 October 1998. The appellant's brief was not filed until 13 June 2003, nearly five years later. All briefs were filed and the case was placed in panel for decision on 15 April 2004. We heard oral argument on 13 October 2004. The record of trial in this capital case includes 3091 pages and hundreds of prosecution, defense, and appellate exhibits. The various appellate briefs and other substantive filings number hundreds of pages. The appellant's brief and assignments of error alone numbers 408 pages.

In a civilian capital case, the appellant may relieve himself of any anxiety and suffering stemming from the combination of a death sentence and unpredictable periods of post-trial delay by simply declining to file appeals. *See Foster v. Florida*, 537 U.S. 990, 991, 154 L. Ed. 2d 359, 123 S. Ct. 470 (2002)(Thomas, J., concurring). However, as the appellant correctly argues in his brief, a military capital appellant cannot avoid appellate review of his sentence. Waiver or withdrawal of appellate review in a military capital case is not an option. Art. 61, UCMJ. By congressional mandate, both this court and our superior court must review a case in which the approved sentence includes the death penalty. Art. 66(b)(1), UCMJ; Art. 67(a)(1), UCMJ.

Every appellant has a right to the timely appellate review of his court-martial conviction and sentence. *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004); *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003). This right has both due process constitutional and Article 66, UCMJ, statutory roots. *Toohey*, 60 M.J. at 101. To determine whether appellate delay violates the right to timely review, we consider four factors: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant. *Id.* at 102.

The length of appellate delay is a threshold factor that determines whether continued analysis is necessary. If the delay is not excessive, further scrutiny may be avoided. If the delay is excessive, the other factors must be applied and evaluated.

We conclude that the delay in appellate review has been excessive. This case sat in the Appellate Defense Division for nearly five years before a brief was filed. While no "talismanic number of years or months (of appellate delay)" has been established as a hard-and-fast test, *Id.* at 103 (quoting *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990)), based on the facts and circumstances of this case, we are convinced that nearly six years from docketing to placing the case in panel for decision is too long.

The second factor is the reasons for the delay. We note that at least six appellate defense counsel entered appearances before the filing of the appellant's brief and

assignment of errors. As the appellate delay lengthened, we held chambers conferences to discuss the delay in filing and encourage counsel to file a brief as soon as possible. Based on our discussions in those conferences and various appellate filings, particularly the 37 Motions for Enlargement of Time to file a brief, we find that a certain "revolving-door" mentality was the most significant obstacle to preparing and filing the brief. In other words, appellate defense counsel consciously or subconsciously deferred writing a brief in this case until they transferred or left active duty, when the case would be turned over to a successor appellate defense counsel. We sympathize with these appellate defense counsel who faced the daunting task of reading and digesting thousands of pages of transcript and exhibits, then preparing a brief in this capital case, particularly when those counsel had many other assigned cases that required their attention. However, upon entering an appearance, each of these attorneys had an obligation to read the record and file a brief in a timely manner.

The third factor is the appellant's specific demand for a timely appeal. In this case, the appellant has not filed such a specific demand.

The fourth and final factor is prejudice to the appellant. Based strictly on the passage of time, no prejudice has been asserted, and no prejudice is apparent in the record and allied papers.

Thus, after applying the four-factor test, we conclude that the appellant has demonstrated no material prejudice. However, as our previous orders in this case

indicate, we do not condone the length of time required to produce the appellant's initial brief in this case.

Notwithstanding our conclusion that no material prejudice has been demonstrated, we may still afford the appellant relief stemming from our broad powers under Art. 66, UCMJ. *Toohey*, 60 M.J. at 103-04; *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). Based on our review of the entire record, we decline to grant relief for appellate delay.

**VII. Conclusion**

Based on our decision on the challenge for cause, the remaining assignments of error are moot. The findings and sentence are set aside. The record is returned to the Judge Advocate General for remand to an appropriate convening authority. A rehearing may be ordered. If a rehearing is not ordered, the charges and specifications shall be dismissed.

Senior Judge CARVER concurs.

**CONCURBY:** RITTER In Part

**DISSENTBY:** RITTER In Part

**DISSENT:** RITTER, Senior Judge (concurring in part and dissenting in part):

I concur with the majority opinion, except as to the appropriate remedy for the military judge's erroneous grant of the Government's challenge for cause against

Master Sergeant (MSgt) Buckham. I am not persuaded that the findings must be set aside. I would vote to set aside the sentence only, and order a rehearing on sentence.

The majority properly cites two United States Supreme Court decisions that found only the sentence is affected when a juror is improperly dismissed because of his or her views on capital punishment that do not rise to the level of "preventing or substantially impairing" that person's ability to perform the duties of a juror. Yet, the majority fails to distinguish these binding precedents while concluding that "military due process" requires us to set aside both the sentence and the findings in this case. Both *Adams v. Texas*, 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980) and *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622, 107 S. Ct. 2045 (1987) involved improper grants of prosecution challenges for cause, just as we have in this case. The Supreme Court saw no need to set aside the findings in those cases, and the same logic applies here.

In attempting to establish that "military due process" requires that the findings be set aside, the majority relies primarily on two military precedents. One case was decided by our superior court, *United States v. Giles*, 48 M.J. 60 (C.A.A.F. 1998), and the other by this court, *United States v. Pritchett*, 48 M.J. 609 (N.M.Ct.Crim.App. 1998). Neither case involved a member being dismissed because of his views concerning the death penalty, as occurred in this case and in the two United States Supreme Court cases cited above. Moreover, the two military cases are easily distinguishable for another reason.

In *Giles*, the military judge's improper denial of a defense challenge for cause left a member who had "clearly demonstrated an actual bias" on the panel. *Giles*, 48 M.J. at 63. That member's biased approach to sentencing in drug distribution cases logically suggested the possibility of bias in the findings stage of drug distribution cases as well. Similarly, in *Pritchett*, this court presumed prejudice from the military judge's improper denial of the defense's statutory right to peremptorily challenge a member. Since this statutory right allows the defense to dismiss a member they believe might vote unfavorably to the accused, leaving this member on the panel arguably stacked the court against him. Thus, in both cases, the military judge *improperly allowed a member who should have been dismissed to remain on the panel*, thereby leaving a members panel that was stacked against the accused to deliberate both on findings and the sentence.

Here, the military judge's error left no member on the panel who harbored an actual bias against the appellant, as in *Giles*, or one whom the defense had a statutory right to have dismissed, as in *Pritchett*. It follows that the remaining members panel was not tainted in any way that could affect its deliberations on findings. Moreover, our reading of the record convinced this court that MSgt Buckham *had no difficulty at all* in considering the death penalty. Thus, his dismissal can hardly be said to have prejudiced the appellant, unless perhaps the appellant *desired* the death penalty.

Nevertheless, since *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), the United

States Supreme Court has consistently held that a death penalty cannot be executed where a juror's misgivings about the use of capital punishment were the basis for his or her dismissal, unless those views are so rigid as to hinder the performance of duty as a juror. Our ruling cannot change the fact that the military judge dismissed MSgt Buckham for this improper reason, even if the military judge's rationale is not supported by the record. We must therefore set aside the sentence.

But our reasoning in no way suggests the members' decision on findings was legally deficient. Although the appellant argues that MSgt Buckham's dismissal "ceded a vote to the Government at each of the four death penalty gates[,]" our reading of the record suggests that MSgt Buckham's dismissal just as likely *eliminated* a vote for the Government at every stage of trial.

For these reasons, I respectfully dissent as to setting aside the findings.